

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ANTHONY TRUPIA,

Plaintiff,

v.

Case No. CIV-24-498-SLP

HERITAGE HARD ASSETS LLC; et al.,

Defendants.

**DEFENDANT ONVOY, LLC'S REPLY IN SUPPORT OF ONVOY'S
RULE 12(B)(2) AND 12(B)(6) MOTION TO DISMISS
PLAINTIFF'S PETITION AND BRIEF IN SUPPORT**

Pursuant to Federal Rule of Civil Procedure 12(b)(2) and 12(b)(6), Defendant Onvoy, LLC (“Onvoy”) files this brief reply to Plaintiff’s Opposition to All Motions to Dismiss (“Plaintiff’s Response”) (Dkt 61).¹

Plaintiff Anthony Trupia (“Plaintiff”) argues that “in agreeing to the removal, all defendant parties have already stipulated that his complaint is well [pled].” (Dkt 61) (emphasis in original). The authorities that Plaintiff cites do not support the position that a defendant somehow waives its opportunity to file a motion to dismiss because it removed the case to federal court. *See Bilal v. Burns Sec. Services*, No. 1:91CV750, 1991 WL 326499, at *2 (E.D. Tex. Feb. 18, 1991) (remanding state law claims back to state court because “no independent grounds for federal question jurisdiction over the state law claims

¹ On July 5, 2024, Plaintiff filed a second response to Onvoy’s Motion to Dismiss. Onvoy intends to file a brief reply to that response within the time allowed under local rules.

appear from the complaint that support removal”); *Gully v. First Nat'l Bank*, 299 U.S. 109, 117-18 (1936) (remanding the case to state court and noting that the “most one can say is that a question of federal law is lurking in the background”).

A defendant is permitted to file a motion under Federal Rule of Civil Procedure 12(b) after removing a case from state court. *See City of Edmond v. Lawrence*, No. CIV-23-213-R, 2023 WL 4921527, at *1 (W.D. Okla. Aug. 1, 2023) (granting the defendant’s motion to dismiss after removal to federal court); *Gallegly v. Cordell Mem'l Hosp. Found.*, No. CIV-22-817-R, 2022 WL 16936049, at *4 (W.D. Okla. Nov. 14, 2022) (same). Further, the Tenth Circuit has held that filing a motion to dismiss in state court could cause defendants to waive the right to remove. *City of Albuquerque v. Soto Enters., Inc.*, 864 F.3d 1089, 1099 (10th Cir. 2017) (“We hold that when a defendant files a motion to dismiss seeking disposition, in whole or in part, on the merits in state court before removing the case to federal court, it manifests a ‘clear and unequivocal’ intent to submit the case to the state court’s jurisdiction, and thus waives removal.”). *City of Albuquerque* demonstrates that Onvoy followed the proper procedure – *i.e.*, removal followed by a motion to dismiss. Accordingly, Onvoy did not waive its right to file a motion to dismiss by joining the removal of Plaintiff’s case to federal court.

For the reasons stated above and in Onvoy’s Motion to Dismiss (Dkt 58), the Court should grant Onvoy’s motion and dismiss Plaintiff’s claims against it with prejudice.

Dated: July 8, 2024

Respectfully submitted,

/s/ Nicholas V. Merkley

Nicholas (“Nick”) V. Merkley, OBA No. 20284
Gerard D’Emilio, OBA No. 33496
GABLEGOTWALS
BOK Park Plaza
499 West Sheridan Avenue, Suite 2200
Oklahoma City, Oklahoma 73102
Tel (405) 235-5500 | Fax (405) 235-2875
Email NMerkley@Gablelaw.com
GDemilio@Gablelaw.com

and

Shawn D. Golden, OBA #21431
Heidi Rasmussen, *pro hac vice forthcoming*
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002-5005
Telephone: +1.713.890.5000
shawn.golden@morganlewis.com
heidi.rasmussen@morganlewis.com

Ezra D. Church, *pro hac vice forthcoming*
MORGAN, LEWIS & BOCKIUS LLP
2222 Market Street
Philadelphia, PA 19103-2921
Telephone: +1.215.963.5000
Facsimile: +1.215.963.5001
ezra.church@morganlewis.com

Attorneys for Onvoy, LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2024, I electronically transmitted the attached document to the Clerk of Court using the Electronic Case Filing System for filing and served on the following via First-Class United States Mail:

Anthony Trupia
605 SE 21st St.
Oklahoma City, OK 73129

/s/ Nicholas V. Merkley
Nicholas V. Merkley